

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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AREZOU MANSOURIAN; LAUREN
MANCUSO; NANCY NIEN-LI
CHIANG; CHRISTINE WING-SI NG;
and all those similarly
situated,

NO. CIV. S-03-2591 FCD EFB

Plaintiffs,

v.

MEMORANDUM AND ORDER

BOARD OF REGENTS OF THE
UNIVERSITY OF CALIFORNIA
at DAVIS; LAWRENCE "LARRY"
VANDERHOEF; GREG WARZECKA;
PAM GILL-FISHER; ROBERT
FRANKS; and LAWRENCE SWANSON,

Defendants.

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This matter is before the court on the parties' cross-motion
in limine to clarify the relevant time period for plaintiffs
Arezou Mansourian, Lauren Mancuso, and Christine Wing-Si Ng's
(collectively "plaintiffs") Title IX claim against defendant
Board of Regents of the University of California at Davis
("defendant"). Plaintiffs assert that the relevant time period

1 for analyzing whether defendant has a history and continuing
2 practice of program expansion should extend back to 1972.
3 Conversely, defendant asserts that the relevant time period for
4 assessing Title IX compliance is between 1995 and 2006.

5 Title IX, 20 U.S.C. § 1681, et seq., provides, "No person in
6 the United States shall, on the basis of sex, be excluded from
7 participation in, be denied the benefits of, or be subjected to
8 discrimination under any education program or activity receiving
9 Federal financial assistance." In 1975, the Department of
10 Education (the "DOE") issued the Title IX regulation pertaining
11 to athletics, 34 C.F.R. 106.41, which further clarifies that
12 "[n]o person shall, on the basis of sex, be excluded from
13 participation in, be denied the benefits of, be treated
14 differently from another person or otherwise be discriminated
15 against in any interscholastic, intercollegiate, club or
16 intramural athletics offered by a recipient." In 1979, the
17 Department of Health, Education, and Welfare¹ issued a Policy
18 Interpretation, 44 Fed. Reg. 71,413, to assist schools with
19 compliance with Title IX.²

20 A university's athletics program is Title IX-compliant if it
21 satisfies one of the following conditions:

22 (1) . . . [I]ntercollegiate level participation
23 opportunities for male and female students are provided

24 ¹ The OCR later was authorized by Congress to issue Title
25 IX's regulations with respect to athletic opportunities. See
26 Pub.L. No. 93-380, 88 Stat. 612 (1974).

27 ² The Ninth Circuit has held that both the Policy
28 Interpretation and the Clarification are entitled to deference.
Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 965 n.9
(9th Cir. 2010).

1 in numbers substantially proportionate to their
2 respective enrollments; or

3 (2) Where the members of one sex have been and are
4 underrepresented among intercollegiate athletes, . . .
5 the institution can show a history and continuing
6 practice of program expansion which is demonstrably
7 responsive to the developing interest and abilities of
8 the members of that sex; or

9 (3) Where the members of one sex are underrepresented
10 among intercollegiate athletes, and the institution
11 cannot show a continuing practice of program expansion
12 such as that cited above, . . . it can be demonstrated
13 that the interests and abilities of the members of that
14 sex have been fully and effectively accommodated by the
15 present program.

16 Neal v. Bd. of Trustees of the Cal. State Univ., 198 F.3d 763,
17 769 (9th Cir. 1999) (quoting 44 Fed. Reg. 71,418). This three
18 part test reinforces that "Title IX is a dynamic statute, not a
19 static one. It envisions continuing progress toward the goal of
20 equal opportunity for all athletes." Id. In this case,
21 defendant is relying on its alleged compliance with the second
22 prong of the three part test.

23 In its 1996 Clarification of Intercollegiate Athletics
24 Policy Guidance: The Three-Part Test (the "Clarification"), the
25 OCR stated that under the second prong of the three part test, an
26 institution can demonstrate compliance with Title IX by showing
27 "that it has a history and continuing practice of program
28 expansion which is demonstrably responsive to the developing
interests and abilities of the underrepresented sex." (Ex. B to
Def.'s Trial Brief, at 5.) The Clarification also expressly
provides the analysis the OCR will conduct to assess compliance
with the history of program expansion component of prong two.
Specifically, it provides, "OCR will review *the entire history of*
the athletic program, focusing on the participation opportunities

1 provided for the underrepresented sex." (Id. (emphasis added).)
2 However, "[t]here are no fixed intervals of time within which an
3 institution must have added opportunities" nor "is a particular
4 number of sports dispositive." (Id.) "Rather, the focus is on
5 whether the program expansion was responsive to developing
6 interests and abilities of the underrepresented sex." (Id.) The
7 OCR considers, *inter alia*, (1) "an institution's record of adding
8 intercollegiate teams, or upgrading teams to intercollegiate
9 status, for the underrepresented sex"; (2) "an institution's
10 record of increasing the number of participants in
11 intercollegiate athletics who are members of the underrepresented
12 sex"; and (3) "an institution's affirmative responses to requests
13 by students or others for addition or elevation of sports." (Id.
14 at 6.)

15 The 1996 Clarification also provides examples of what may
16 constitute compliance with the second prong, which demonstrate
17 that while analysis focuses on the entire history of a
18 University's athletic program, the relevant time period for
19 finding compliance may be shorter based upon more recent
20 aggressive expansion. For instance:

21 Institution F started its women's program in the early
22 1970s with four teams. It did not add to its women's
23 program until 1987 when, based on requests of students
24 and coaches, it upgraded a women's club sport to
25 varsity team status and expanded the size of several
26 existing women's teams to accommodate significant
27 expressed interest by students. In 1990 it surveyed
28 its enrolled and incoming female students; based on
that survey and a survey of the most popular sports
played by women in the region, Institution F agreed to
add three new women's teams by 1997. It added a
women's team in 1991 and 1994. Institution F is
implementing a plan to add a women's team by the spring
of 1997. Based on these facts, OCR would find
Institution F in compliance with part two. Institution

1 F's program history since 1987 shows that it is
2 committed to program expansion for the underrepresented
3 sex and it is continuing to expand its women's program
in light of women's developing interests and abilities.


4 (Id. at 7.) The handful of decisions that have examined the
5 second prong both before and after the 1996 Clarification is
6 consistent with this approach. See Cohen v. Brown Univ., 809 F.
7 Supp. 978, 981, 991 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir.
8 1993) (examining the defendant university's history of program
9 expansion from the late 1970s); Roberts v. Colo. State Bd. of
10 Agriculture, 998 F.2d 824, 830 (10th Cir. 1993) (examining
11 university's history of program expansion for women starting in
12 the 1970s); Bryant v. Colgate Univ., 1996 WL 328446, at *10-11
13 (N.D.N.Y. June 11, 1996) (examining the defendant university's
14 history of program expansion from 1972 when the university first
15 offered women's sports); Barrett v. West Chester Univ., 2003 WL
16 22803477, at *7 (E.D. Pa. Nov. 12, 2003) (considering entire
17 history of expansion, where the first team was added in 1979).

18 Based upon the principles of Title IX, the guidance provided
19 in the 1996 Clarification, and case law discussing prong two of
20 the three part test, the court concludes that the court must
21 *review the entire history* of the athletic program in determining
22 whether defendant was compliant with Title IX when plaintiffs
23 were students. While a shorter, more current period of
24 aggressive remedial efforts may be highly relevant to
25 establishing compliance with prong two, the "dynamic" nature of
26 Title IX, which calls for continuing progress toward the goal of
27 equal opportunity, requires that the court look at the entirety
28 of the program as a whole. See Neal, 198 F.3d at 769.

1 Defendant's argument relating to standing is inapposite.
2 Both plaintiffs and defendant agree that plaintiffs may only
3 recover based upon demonstration of actual harm. Indeed,
4 plaintiffs' ability to recover for Title IX violations are wholly
5 separate from the determination of whether defendant was in
6 violation of Title IX. As such, defendant's argument in support
7 of a truncated time period is without merit.

8 IT IS SO ORDERED.

9 DATED: April 29, 2011

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12 FRANK C. DAMRELL, JR.
13 UNITED STATES DISTRICT JUDGE
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